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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H026596

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. CC254536)

v.

ANTONIO MADINA BIRREY,

Defendant and Appellant.

Defendant pleaded guilty to two counts of forcible lewd conduct on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1)). The trial court imposed concurrent upper terms of eight years in state prison. Defendant asserts that the trial court's imposition of upper terms violates *Blakely v. Washington* (2004) 124 S.Ct. 2531. He also asserts that the aggravating circumstances identified by the trial court were either not supported by any evidence or were elements of the offenses that could not be used to justify imposition of an upper term. Because we conclude that the trial court's imposition of upper terms violates *Blakely*, we reverse the judgment and remand for resentencing in compliance with *Blakely*.

I. Background

Defendant was charged by complaint with two counts of forcible lewd conduct on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1)), and it was further alleged that he was ineligible for probation under Penal Code section 1203.066, subdivision (a)(1). Defendant waived his right to a preliminary hearing, and he pleaded no contest to both counts.

The probation report identified three aggravating circumstances: (1) the crime involved violence; (2) the victim was particularly vulnerable; and (3) defendant took advantage of a position of trust or confidence. The report also identified two mitigating circumstances: (1) defendant had no prior record and (2) he acknowledged his wrongdoing at an early stage. The probation officer recommended the imposition of consecutive six-year midterm sentences for a total term of 12 years in state prison.

At the sentencing hearing, defendant's trial counsel sought concurrent mitigated or midterm sentences. He challenged the aggravating circumstances identified in the probation report. The court found defendant statutorily ineligible for probation and imposed concurrent eight-year upper terms. The court identified five aggravating circumstances that it believed justified the upper terms: (1) "defendant occupied a position of trust in relationship to the victim;" (2) "there was force used;" (3) "the victim requested the defendant to stop and he continued;" (4) "there was skin-to-skin contact;" and (5) "the victim was young and innocent indicating in the Court's mind her vulnerability."

II. Analysis

A. Waiver or Forfeiture

The Attorney General claims that defendant waived his *Blakely* contention by failing to object on this ground below. We conclude that defendant has not forfeited this issue by failing to object at the sentencing hearing.

California courts “have excused a failure to object where to require defense counsel to raise an objection ‘would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that [the law] would be changed on appeal.’” (*People v. De Santiago* (1969) 71 Cal.2d 18, 23 [evidentiary error]; *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [sentencing error].)

Defendant’s sentencing hearing occurred in May 2003. The United States Supreme Court issued its decision in *Blakely* in June 2004. Until *Blakely*, it was well accepted in California that there was no Sixth Amendment right to have a jury decide fact questions underlying sentencing decisions on a particular count. (See *People v. Wiley* (1995) 9 Cal.4th 580, 585.) The holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 appeared to be inapplicable to California sentencing decisions because those sentencing decisions did not increase the penalty for the crime beyond the *statutory maximum*. (See *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1232.) To the extent that defendant asserts that *Blakely* alters that perception, *Blakely* was an unforeseen change in the law. We conclude that it would be unreasonable for us to find this issue forfeited solely because defendant’s trial counsel failed to anticipate the need for an objection on a ground that did not at that time reasonably appear to have merit.

B. *Blakely*

The Attorney General claims that *Blakely* does not apply to California’s sentencing scheme because it is significantly different from the Washington scheme invalidated in *Blakely*. While there are distinctions between the California and Washington sentencing schemes, these differences do not mean that *Blakely* is inapplicable to California’s determinate sentencing scheme. A careful examination of

Blakely demonstrates that the procedure by which defendant was sentenced here violated the Sixth Amendment, and therefore defendant's sentence is invalid.

Blakely had pleaded guilty to second degree kidnapping with a firearm and involving domestic violence. (*Blakely* at pp. 2534-2535.) His plea did not encompass his admission of any additional facts beyond the elements of this offense. (*Blakely* at p. 2534.) The statutorily prescribed "standard range" sentence for this offense was 49 to 53 months. However, a sentence above the "standard range," up to a maximum of 10 years, could be imposed *if* the judge found "substantial and compelling reasons" for a higher sentence. An illustrative list of aggravating factors was set forth in a statute. An element of the offense could not be used as an aggravating circumstance, and the judge was required to state his or her reasons for imposing a sentence higher than the "standard range." These reasons would be reviewed on appeal for sufficiency of the evidence. (*Blakely* at p. 2535.)

The prosecution recommended a "standard range" sentence. But the judge heard testimony from the victim and decided that Blakely's "deliberate cruelty" justified imposition of a sentence of 90 months, 37 months higher than the top of the "standard range." Blakely objected to the aggravated sentence, and the judge held an evidentiary hearing. After the hearing, the judge reiterated his "deliberate cruelty" finding and the 90-month sentence. (*Blakely* at pp. 2535-2536.)

On appeal, Blakely claimed that he had a "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." The question before the U.S. Supreme Court was whether *Apprendi* applied in this situation since the 10-year *maximum* had not been exceeded even though the 90-month term exceeded the top of the "standard range" that applied in the absence of additional factual findings by the judge that had not been made by the jury. (*Blakely* at pp. 2536-2537.)

The U.S. Supreme Court held that the Washington procedure by which Blakely had been sentenced violated the Sixth Amendment, and the resulting sentence was constitutionally invalid. “Our precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment, [citation], and the judge exceeds his proper authority.’” (*Blakely* at p. 2537, original emphasis.) “Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.” (*Blakely* at p. 2538.)

C. Application of *Blakely* Here

Defendant’s crimes are each punishable by one of three possible terms: three, six or eight years. (Pen. Code, § 288, subd. (b)(1).) “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (Pen. Code, § 1170, subd. (b).) The trial court was *required to impose* the six-year middle terms and could *not* impose the eight-year upper terms unless it found that there were “circumstances in aggravation” that justified upper terms. Since “[a] fact that is an element of the crime shall not be used to impose the upper term” (Cal. Rules of Court, rule 4.420(d)), the aggravating circumstances that are used by a trial court to justify imposition of an upper term

necessarily must be based on facts that are not part of a plea that encompasses only the elements of the offense. The court must state its reasons for imposing the upper term (Rule 4.420(e)), and those reasons must be supported by substantial evidence on appeal. (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1096.) The court need only find these aggravating circumstances true by a preponderance of the evidence. (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

California's determinate sentencing scheme is analogous to the Washington sentencing scheme with respect to *Blakely*. Washington's sentencing scheme has a "standard range" sentence that may be imposed without any additional findings beyond the elements of the crime, and a higher sentence that may be imposed only if the court makes factual findings that there are aggravating circumstances. California's sentencing scheme has a middle term sentence that may be imposed without any additional findings beyond the elements of the crime, and an upper term sentence that may be imposed only if the court makes factual findings that there are aggravating circumstances. Just as the "statutory maximum" for *Blakely* purposes under the Washington scheme is the top of the "standard range," the "statutory maximum" for *Blakely* purposes under California's scheme is the middle term. Under both schemes, a fact that is an element of the offense may not be used to impose the upper term. And under both schemes the court must state reasons for the imposition of the upper term that must be supported by substantial evidence on appeal.

Imposition of an upper term in California, like imposition of a sentence higher than the "standard range" in Washington, depends upon factual findings beyond the admitted or jury-adjudicated elements of the crime. This is precisely what the U.S. Supreme Court found violated the Sixth Amendment in *Blakely*. Defendant, like *Blakely*, pleaded guilty to his offenses and did not admit any elements other than the elements of his offenses. The trial court then made additional factual findings beyond the elements of defendant's crimes and utilized those factual findings to justify

imposition of the upper term. This procedure violated the Sixth Amendment in the same way that the sentencing procedures in *Blakely* violated the Sixth Amendment.

Because defendant's pleas did not justify the imposition of the upper term, the trial court's factual findings in support of the upper term violated defendant's Sixth Amendment rights under *Blakely*. His sentence is therefore invalid.

D. Prejudice

The Attorney General asserts that the trial court's violation of defendant's Sixth Amendment rights was harmless beyond a reasonable doubt because the court's factual findings were supported by the evidence. Assuming that such a standard of prejudice may properly be applied where no jury was convened at all, we conclude that the record before us does not demonstrate beyond a reasonable doubt that a jury would necessarily have found true all or any of the aggravating circumstances found true by the trial court. Indeed, there appears to be substantial merit to defendant's argument on appeal that two of the five aggravating circumstances (use of force and the victim's age) were elements of the offenses that could not be used to aggravate and that one of the three remaining circumstances (position of trust) was supported by little if any evidence. Whether the two remaining circumstances (skin-to-skin contact and failure to stop upon request) would have been found to outweigh the mitigating circumstances is uncertain. Under these circumstances, the Attorney General has clearly failed to satisfy his burden of demonstrating beyond a reasonable doubt that the trial court's error in failing to afford defendant a jury trial on the aggravating circumstances did not prejudice defendant.

III. Disposition

The judgment is reversed, and the matter is remanded for resentencing in compliance with *Blakely*.

Mihara, J.

WE CONCUR:

Rushing, P.J.

Premo, J.